IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 222 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

KISMET PVT LTD

Appearance:

MRS M.M.BHATT FOR MR MANISH R BHATT for Petitioner No. 1

NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 11/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 This is a reference at the instance of the Commissioner of Income Tax under Section 256(1) of the Income Tax Act, 1961 ('the Act' for short). The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question for our opinion :

"Whether, the Appellate Tribunal is right in law and on facts in cancelling the penalty levied by the ITO u/s.273(2)(a) amounting to Rs.15,000/-."

2 Heard Mrs.M.M.Bhatt, learned Standing Counsel for the applicant-revenue. Though served none appears on behalf of the respondent.

3 The assessment year is 1980-81 and the relevant accounting period is calendar year 1979. The assessee is a Private Limited Company. The assessee filed assessment showing the total income of Rs.8,50,000/- and paid advance tax amounting to Rs.5,95,000/-. However, ultimately income came to be assessed at a figure of Rs.12,65,210/-. One of the principal additions pertained to disallowance of a sum of Rs.1,97,418/-, out of advertisement and publicity expenses by resort to provisions of Section 37(3A) of the Act. The Income Tax Officer rejected the explanation of the assessee that it was under a bonafide belief that the advertisement expenses did not fall within the provisions of Section 37(3A) of the Act but were governed by the exception provided in Section 37(3D) of the Act. The Income Tax Officer levied a penalty of Rs.15,000/- as against minimum penalty of Rs.13,878/-. This order came to be confirmed by the CIT (Appeals) in the appeal preferred by the assessee.

4 Being aggrieved the assessee preferred Second Appeal before the Tribunal being Income Tax Appeal No.2840/Ahd/86. The assessee contended before the Tribunal that it was under a bonafide belief that its case was governed by the provision of Section 37(3D) of the Act and not Section 37(3A) of the Act. In support of the contention, the assessee placed reliance on the fact that similar expenditure had been allowed in the assessment of assessment year 1979-80 and till point of time the assessee filed the estimate of the advance tax the assessment for the said assessment year had not been disturbed. The tribunal for the reasons stated in its impugned order dated 19.12.1989 accepted the submissions made on behalf of the assessee and cancelled the penalty.

5 Mrs.Bhatt, learned Standing Counsel appearing on behalf of the applicant revenue submitted that the Tribunal had erroneously placed reliance on the assessment order for the assessment year1979-80 because the said order has been revised under Section 263 of the Act. It was further submitted that whether the assessee

was under a bonafide belief or not had not been proved by the assessee and the ITO had rightly rejected the said plea.

6 The Tribunal has found as a matter of fact that when the assessee filed its estimate of advance tax for the year under consideration it was supported by the assessment order for the immediately preceding assessment year viz. assessment year 1979-80. Hence, according to the Tribunal the belief of the assessee that its case was governed by provision of Section 37(3D) of the Act and not Section 37(3A) of the Act was a bonafide belief. The Tribunal had also taken note of the fact that the revisional proceeding under Section 263 of the Act were taken subsequent in point of time i.e. much later after the estimate of advance tax had been filed by the assessee. The Tribunal has further held that for the purpose of determining as to whether the assessee had correctly estimated its income and paid correct advance tax, what was to be taken into consideration was the figure of current income which according to the assessee was the current income at the point of time when it made the estimate of advance tax and not the figure of income ultimately assessed by the Income Tax Officer. That merely because in the assessment at a subsequent date, the assessee is assessed at higher figure, that by itself is not sufficient to hold that the assessee should be visited with penalty for shortfall in payment of advance tax.

7 In light of what is stated hereinbefore and the findings of fact recorded by the Tribunal we do not find any reason to interfere with the impugned order of the Tribunal dated 19.12.1989. The Tribunal has rightly held that merely because an assessee is assessed at a higher figure that by itself is not sufficient to hold that the estimate filed by the assessee was untrue resulting in the assessee being penalized for filing incorrect estimate. The provision requires that the estimate must be false viz. that the assessee knew or had reason to believe that the estimate of advance tax was untrue.

8 In the present case, the assessee has pleaded a bonafide belief as regards the applicable provisions to the facts of the case and the assessee is duly supported by the assessment order for assessment year 1979-80 i.e. immediately preceding assessment year.

9 In the circumstances, the question referred to us is answered in the affirmative i.e. in favour of the assessee and against the revenue. The reference stands

disposed of accordingly. There shall be no order as to costs.

(D.H.Waghela, J) (D.A.Mehta, J)

m.m.bhatt